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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

DOLORES ALVAREZ, FRANK ALVAREZ,
CHRISTINA ALVAREZ,

Petitioners,

vs.

CITY OF WESTMORLAND and LLOYD RUNNING

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT MANN, *Counsel of Record*
DONALD W. COOK
ATTORNEYS FOR PETITIONERS
3435 Wilshire Boulevard, Ste. 2900
Los Angeles, CA 90010
(213) 252-9444

36 pp.

QUESTIONS PRESENTED

1. Where a state police officer shoots and kills a person, must the jury be instructed on the specific limitations this Court established in *Tennessee v. Garner*, 471 U.S. 1, 12 (1985), governing the use of *deadly force*, or is it sufficient to instruct the jury on the general Fourth Amendment use-of-force standard this Court articulated in *Graham v. Connor*, 490 U.S. 386 (1989)?

2. Where a state police officer shoots and kills a person, must the jury be instructed that, in determining the reasonableness of the use of force, the jury "may consider whether or not alternative courses of action were available to the officer?"

3. Where a state police officer shoots and kills a person, must the jury be instructed that an officer should give a *warning* before shooting, "if feasible?"

LIST OF PARTIES

Petitioners Dolores Alvarez, Frank Alvarez and Christina Alvarez were plaintiffs and appellants in the courts below. Respondents City of Westmorland and Westmorland police officer Lloyd Running were the defendants and appellees in the courts below.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

DOLORES ALVAREZ, FRANK ALVAREZ,
and CHRISTINA ALVAREZ,

Petitioners,

vs.

CITY OF WESTMORLAND etc., et al.,

Respondents.

Petitioners Dolores Alvarez, Frank Alvarez, and Christina Alvarez, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed in this proceeding on July 21, 1997.

OPINIONS BELOW

The decision of the court of appeals was not reported. It appears in the Appendix hereto [hereinafter "Apx."], Appendix A. The decision by the District Court for the Southern District of California was not reported. A copy appears as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was filed on July 21, 1997. Apx. A-1. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on September 3, 1997. Apx. B-1. This petition for certiorari was filed December 2, 1997, within 90 days of September 3, 1997. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Code, Title 42:

§ 1983. Civil Action for Deprivation of Rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Proceedings Below

Petitioners Dolores Alvarez, Frank Alvarez and Christina Alvarez sued defendants City of Westmorland and Westmorland police officer Lloyd Running, alleging, *inter alia*, violations of 42 U.S.C. § 1983. A jury trial resulted in a judgment for defendants. Petitioners appealed. The Ninth Circuit affirmed.

B. Statement Of Facts

This case involves the shooting death of 57-year-old Joe Alvarez by Westmorland police officer Lloyd Running. Although the Ninth Circuit believed "that Joe Alvarezes' [sic] death was needless," it was unable to "find reversible error in any of the court's rulings." Apx. A-4.

Westmorland is a town of a few hundred people in California's rural Imperial Valley. The Alvarez family had lived and worked there (hauling produce in their trucks) for generations.

Officer Running responded to a police dispatch that "two girls are fighting." They were Mr. Alvarez' 19-year-old granddaughter and 29-year-old daughter-in-law. They were pulling hair and hitting one-another in the street in front of the Alvarez home.

Officer Running was only one block away when he got the "girls fighting" call. He arrived within thirty seconds. As he arrived, Running observed both women walking away from one another and saw that no one was injured and no weapon was involved. Running saw one of the women, Mr. Alvarez' two-hundred pound, nineteen-year-old granddaughter ("Fina"), walk inside Mr. Alvarez' house.

The other, Mrs. Christina Alvarez, remained standing outside.

Although Running had been with the Westmorland police department only a short time (having been recently terminated from his previous employment with the Beaumont police department after a wrongful shooting, beating a prisoner, and making a false report)[1], he recognized Fina, who was known to him as a notorious trouble-maker and liar, who even claimed to be having affairs with members of the police department, including Running himself.[2]

Running decided to enter the Alvarez home to check on Fina. Mr. Alvarez said the fight was over and objected. Running forced his way into the home, pushed Mr. Alvarez to the floor, sprayed Mr. Alvarez with oleoresin capsicum spray ("OC" or pepper spray) and ran out of the house.

Mr. Alvarez came out of his house after Running. Mr. Alvarez had suffered a stroke and walked with a limp. RT 100, 461-62, 819. Mr. Alvarez picked up a wrench from his toolbox sitting next to his truck and threw it at Running. Running shot Mr. Alvarez

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[1] Petitioners were not permitted discovery of the details of Running's history.

[2] Although petitioners did not offer this information for its truth, but merely to show the unreasonableness of Running's actions given the information he had, the jury was not permitted to learn what Running knew about Fina because it was "hearsay." Apx. A-7. The jury was, however, permitted to consider the unflattering details of the fight which had occurred, although completely unknown to Running, because it "'set the stage' for Officer Running's arrival, and because the jury would want to know what had occurred." Apx. A -6. It also served as the basis for defendants' argument that the Alvarez family was "dysfunctional" and, implicitly, that Joe Alvarez' death was of no consequence. Apx. A-6.

twice in the chest.[3] Mr. Alvarez died from his wounds eight days later.

Running claimed that he justifiably pushed his way into the Mr. Alvarez' home to check on Fina's welfare[4] and killed Mr. Alvarez in self-defense.[5]

Petitioners claimed Running provoked the whole incident by unreasonably forcing entry into the Alvarez' home, and that it was not necessary to shoot Mr. Alvarez because Running was not in danger of serious physical harm.[6] Petitioners' police practices expert

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[3] Running shot decedent once, waited 3 seconds and, over the cries of "stop, don't shoot, don't shoot" (RT 105), shot decedent a second time, even though the first shot probably disabled decedent (RT 457, 461, 471 [coroner's testimony]).

[4] Petitioners sought a jury instruction that the burden of proving the lawfulness of the entry was on Running. AER 156. The district court disagreed. AER 411:23-412:1. The Ninth Circuit held that the burden was on Running, but--despite what the record unequivocally reveals--that the jury had been properly instructed that the burden was on Running. Apx. A-12. See Petition for Rehearing at 15.

[5] Petitioners' request for a jury instruction that Running bore the burden of establishing self-defense was rejected. Apx. A-11.

[6] It was unclear whether Mr. Alvarez even had the wrench when Running shot Mr. Alvarez. Plaintiffs claimed he already had thrown it. Running had three different versions. The first was that Mr. Alvarez had *never* thrown the wrench. RT 383, 384, 998, 100 (Running statement the night of the shooting). The second was that Mr. Alvarez threw the wrench after the second shot. RT 393 (Running deposition). The third was that Mr. Alvarez threw the wrench between the first shot and the second shot. RT 394, 775 (Running trial testimony). Petitioners' contended that Running was attempting to conform his testimony to the physical evidence. The

testified that, even if Mr. Alvarez had the wrench, Running did not need to shoot because he could have redeployed around his squad car, using it as a shield, RT 702-704, 744-745, did not need to shoot Mr. Alvarez in the chest, RT 708, and should have given a warning. As noted, the Ninth Circuit also believed that "Joe Alvarezes' death was needless." Apx. A-4.

The district court refused to give Petitioners' requested jury instructions, pursuant to *Tennessee v. Garner* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1, 7, 8, 11-12 (1985), and *Kortum v. Alkire*, 69 Cal. App. 3d 325, 333, 138 Cal. Rptr. 26 (1977), that the use of *deadly force* was not permissible unless Mr. Alvarez posed a risk of death or great bodily injury to Officer Running. AER (Appellants' Excerpt of Record in the Ninth Circuit) 151 (*Tennessee v. Garner* standard), AER 46 (*Kortum v. Alkire* standard). Instead, an "objective reasonableness" use-of-force instruction from *Graham v. Conner*, 490 U.S. at 396-97, was given. The Ninth Circuit held it unnecessary to instruct the jury on the stricter requirements for using *deadly force*. The Ninth Circuit held that, according to *this Court*, the circumstances under which *deadly force* may be used "eludes specification." Apx. A-11.

The district court also refused Petitioners' requested instructions that "[i]n determining the reasonableness of the officer's use of force, you may consider whether or not alternative courses of action were available to the officer," and that "[t]he police should give a warning before force is used against a person, if feasible." Apx. A-10-11. The Ninth Circuit again found no error, holding the "omission of specifications of a standard that, according to the

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wrench ended up behind Running and the first shot (through decedent's bicep) made it impossible for him to throw the wrench.

Supreme Court, eludes specification," is not prejudicial. Apx. A-11.[7]

REASONS FOR GRANTING THE WRIT

1. The Court Should Grant Review To Decide Whether A Plaintiff In A Fourth Amendment Shooting Death Case Is Entitled To Jury Instructions Pursuant To *Tennessee v. Garner.*

There can be no dispute that Running used deadly force. Shooting a person in the chest with a gun creates a substantial risk of causing serious injury or death.

There do not appear to be any decision directly addressing whether a court may simply refuse to give instructions offered by a plaintiff setting forth the limitations this Court has imposed on the use of deadly force by police officers.

What may underlie the lower courts' refusal to instruct the jury as to the limitations this Court has imposed on the use of deadly force by police officers is a disagreement with the standard this Court has established. It is not, however, appropriate to manifest any such disagreement by refusing to instruct jurors as to the standards this Court has established.

Although the issue is quite significant, and there do not

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[7] The Circuit also found the district court's instruction that petitioners had to prove that Running acted with "deliberate indifference," toward *them*, RT 1246:16-1247:4; 1249:12-20, to be harmless, since the jurors could have gleaned--from a portion of the Special Verdict they were instructed not to read--that the appropriate definition of "excessive force" did not require a finding of "deliberate indifference." Apx. A-9. See Petition for Rehearing at 14.

appear to be any authorities condoning the position taken by the Ninth Circuit, the court below chose not to publish its opinion. As a result, it may not be cited as authority in the Ninth Circuit. However, the *Alvarez* opinion is easily available to courts and practitioners at 1997 U.S. App. LEXIS 18913. Although the court did not bother even to cite *Garner*, any rudimentary computer research reveals *Alvarez*. *Alvarez* is at least the *de facto* law of the circuit, standing for the proposition that a district court may safely ignore this Court's *Garner* limitations on the use of deadly force by police officers.

There should be no difference between the "published" and "unpublished" law of the Ninth Circuit. Yet clearly there is. This Court's Constitutional limitations on the use of deadly force by police officers *are* enforced in high-profile cases, at least by some Ninth Circuit judges. In the Ruby Ridge case, *Harris v. Roderick*, 126 F.3d 1189(9th Cir. 1997), the court blasted the F.B.I. for ignoring this Court's deadly force rules.[8] The court's large size and

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[8] The court said:

> Certain principles are *clearly established* under the cases described above and others that implement the *fundamental rules* regarding the use of deadly force. Law enforcement officers may not shoot to kill unless, at a minimum, the suspect presents an immediate threat to the officer or others, or is fleeing and his escape will result in a serious threat of injury to persons. [Citations omitted.] Moreover, whenever practicable, *a warning must be given* before deadly force is employed. Garner, 471 U.S. at 11-12.
>
> It is clear that the Special Rules that required the FBI agents to kill "any armed adult male" in the vicinity of the Weaver cabin mandated an unconstitutional use of force, and that no reasonable officer could have believed otherwise.

the impasse in appointing judges do not justify an institutional policy that "unpublished" decisions need not conform to the law of the circuit, or to the binding precedent of this Court.

Since police frequently use deadly force, and because the consequences of using deadly force are quite severe,[9] it is important for the bench and the bar to know whether juries have to be instructed about this Court's Constitutional limitations on when deadly force may be used. As a practical matter, if lower courts have the discretion simply to omit informing juries of the standards for the use of deadly force this Court adopted in *Garner*, then *Garner* is a dead letter. As a result, it will become much more difficult for practitioners to tell a bad shooting from a justifiable shooting, and infinitely harder to settle cases.

In this case, the Ninth Circuit held that it was not necessary to instruct the jury of the limitations on the use of deadly force this Court established in *Tennessee v. Garner* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). According to the Ninth Circuit, instructing the jury of the general "objective unreasonableness" standard found in *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed. 2d 443 (1989), was good enough. To support this holding, the Ninth Circuit said that it could not be prejudicial to omit "specification of a standard that, *according to the Supreme Court*, eludes specification." Apx. A-11 (emphasis added).

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[9] Mrs. Dolores Alvarez, decedent's wife, was diabetic. She could not take care of herself. She had never even managed a checking account. The electricity to her modest home (which she owned) was turned off because she could not pay the electric bill. She became seriously depressed. She tried to commit suicide. RT 115-119, RT 850-853. Frank Alvarez felt so bad "he couldn't move." RT 849. His marriage deteriorated to the point where his wife Christina was ready to leave him. RT 120-121

The circumstances justifying deadly force do not "elude specification." This Court has never held that the circumstances under which deadly force may be used "elude specification." To the contrary, this Court in *Garner* did specify when deadly force may be used.

There are many decisions which recognize and apply *Garner* to deadly force cases, without any claim that its requirements "elude specification." Indeed, the *Ninth Circuit* has used *Garner* to *uphold* the use of deadly force as a matter of law, even where a jury has determined that a police use of deadly force was, in the jury's view, unreasonable. Thus, in *Forrett v. Richardson*, 112 F.3d 416, 419 (9th Cir. 1997), the Ninth Circuit, relying *Garner*, upheld the granting of a judgment notwithstanding the verdict in favor of the police in a case where the jury had found that the police acted unreasonably in shooting the plaintiff. The circumstances justifying the use of deadly force did not "elude specification" when it came to setting aside the jury's verdict.

Other circuits recognize that the circumstances this Court's rules for the use of deadly force do not "elude specification." The importance of the specific, stricter, standard this Court set forth in *Garner* for resolving deadly force cases is quite obvious. The Eighth Circuit, in *Krueger v. Fuhr*, 991 F.2d 435, 438-40 (8th Cir. 1993), held that the officer's use of lethal force was justified as a matter of law because the shooting did not violate the *Garner* lethal force rule. And in *Ludwig v. Anderson*, 54 F.3d 465, 473 (8th Cir. 1995), the same court held *Garner* required reversal of summary judgment for police officers. The Seventh Circuit, in *McDonald v. Haskins*, 966 F.2d 292, 294-95 (7th Cir. 1992), relying on the "the excessive force standard . . . 'inescapably implicit' in *Garner*," reversed the trial court's grant of summary judgment in the officer's favor. The Third Circuit, in *Africa v. City of Philadelphia*, 49 F.3d 945, 954 (3rd Cir. 1995) wrestled with the *definition* of "deadly force"; but never

intimated that when it may be used "eluded specification."

These decisions concretely demonstrate how the *Garner* standard is used by judges in deciding if an officer's use of deadly force violated the Fourth Amendment. The standard obviously does not "elude specification" when judges are seeking to apply it. A standard sufficiently specific for *judges* to use in deciding whether killing a person violates the Fourth Amendment should also be available to *jurors*. It makes no sense to deprive juries of the guidance of this Court upon which lower courts routinely rely. It is illogical to presume that lay jurors know better what is reasonable under the Fourth Amendment than do judges trained in the law. These points are especially important given issues of life and death.

Therefore, the Ninth Circuit's conclusion in this case that it was not necessary to inform the jury of the circumstances under which the use of deadly force is Constitutionally permissible-- because it supposedly "eludes specification"-- was plainly wrong.

Garner should not be a "one way street," available to police defendants to justify shootings as a matter of law in those cases where a jury, if permitted to use a more general "objective unreasonableness standard," might find that the shooting was unreasonable, but unavailable to plaintiffs in those cases where the shooting may not live up to the stricter scrutiny *Garner* requires.

It is beyond argument that a party is entitled to have the jury instructed as to the law. Defendants' arguments that juries need not be instructed as to the Constitutional limitations on the use of deadly force because "the general *Graham* standard subsumes the *Garner* criteria," Appellees' Brief at 34, is farcical. Were that the case, "drive safely" would subsume "speed limit 25 mph," and "do unto others" "thou shalt not kill."

The defendants' position ignores not only common sense but precedent. "Generally, as against a mere general or abstract charge, a party is entitled to a specific instruction on the party's theory of the case if there is evidence to support it and a proper request for such instruction is made." Thompson, 9 Cyclopedia of Federal Procedure § 31.100 at p. 569 (3d ed. 1993 rev.). A party has "of course, the right to require that the general instruction be supplemented by another calling attention to the" law more particularly governing the case. *Louisville & N. R. Co. v. Holloway*, 246 U.S. 525, 528, 38 S.Ct. 379, 62 L.Ed. 867 (1918) (Opinion by Brandeis, J.). "If either party deems any point presented by the evidence to be omitted in the charges, it is competent for such party to require an opinion from the court upon that point." *Pennock & Sellers v. Dialogue*, 27 U.S. (2 Pet.) 1, 15 (1829) (Opinion by Story, J.).

The district court's refusal to instruct the jury in accordance with this Court's *Garner* requirements was prejudicial. Under *Garner*, a critical element for justifying police use of deadly force is that it be *necessary*. 471 U.S. at 11; *Ludwig v. Anderson*, *supra*, 54 F.3d at 471. As the Ninth Circuit acknowledged, "Joe Alvarezes' death was needless." Apx. A-4. If the Ninth Circuit believed Mr. Alvarez' death was "needless," then it was obviously probable that a properly instructed jury could well have reached that same correct conclusion.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

ROBERT MANN, *Counsel of Record*
DONALD W. COOK
Attorneys for Petitioners

DOLORES ALVAREZ, FRANK ALVAREZ, CHRISTINA ALVAREZ, Plaintiffs-Appellants, v. CITY OF WESTMORLAND and LLOYD RUNNING, in both his personal and official capacities, and DOES 1 through 200, inclusive, Defendants-Appellees.

No. 96-55431

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

1997 U.S. App. LEXIS 18913

FILED
JUL 21 1997
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U.S. COURT OF APPEALS

July 9, 1997, Argued and Submitted, Pasadena, California

July 21, 1997, FILED

NOTICE: [*1] RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: 119 F.3d 5, 1997 U.S. App. LEXIS 26052.

PRIOR HISTORY: Appeal from the Decision of the United States District Court for the Southern District of California, D.C. No. CV 94-01119 IEG. Irma E. Gonzalez, District Judge, Presiding.

DISPOSITION: AFFIRMED.

COUNSEL: For DOLORES ALVAREZ, Plaintiff - Appellant: Robert Mann, Esq., Los Angeles, CA. Jorge Gonzalez, Esq., Los Angeles, CA. For FRANK ALVAREZ, Plaintiff - Appellant: Robert Mann, Esq., (See above). Jorge Gonzalez, Esq., (See above). For CHRISTINA ALVAREZ, Plaintiff - Appellant: Robert Mann, Esq., (See above). Jorge Gonzalez,

Esq., (See above).
For CITY OF WESTMORELAND, Defendant - Appellee: Peter M. Ferguson, Esq., FERGUSON, PRAET & SHERMAN, Santa Ana, CA. Peter J. Ferguson, Esq., FERGUSON, PRAET & SHERMAN, Santa Ana, CA. Alison M. Turner, Esq., GREINES, MARTIN, STEIN & RICHLAND, Beverly Hills, CA. For LLOYD RUNNING, in both his personal and official capacities, and DOES I through 200, inclusive, Defendant - Appellee: Peter M. Ferguson, Esq., (See above). Peter J. Ferguson, Esq., (See above). Alison M. Turner, Esq., (See above).
JUDGES: [*2] Before: CANBY and THOMAS, Circuit Judges, and KING, ** District Judge.

** Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.
OPINION: MEMORANDUM *

----------Footnotes----------

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

----------End Footnotes----------

Dolores, Frank, and Christina Alvarez appeal the district court's ruling that the Alvarezes' constitutional and state tort rights were not violated by police officer Lloyd Running and the City of Westmorland. By special verdict, the jury found that Officer Running did not use excessive force in shooting and killing Joe Alvarez while responding to a disturbance at the

Alvarezes' home. Judgment was entered on November 28, 1995. The Alvarezes served their motion for a new trial under Rule 59 of the Federal Rules of Civil Procedure, on December 12, 1995, and filed it on December 22, 1995. The Alvarezes filed notice of the present appeal on [*3] March 14, 1996. Officer Running and the City contest the timeliness as well as the merits of this appeal. We have jurisdiction under 28 U.S.C. § 1291, and affirm on the merits.

BACKGROUND

The parties are familiar with the facts and we repeat them throughout this memorandum only as necessary.

DISCUSSION

A. Timeliness of Appeal

The timeliness of the Alvarezes' appeal centers on a rule change to the filing of Rule 59 motions, which tolls the appeal period under Rule 4(a)(1) of the Federal Rules of Appellate Procedure. In 1995, the old Rule 59(b) was amended from requiring that motions for new trials be filed within a "reasonable time" to the present ten-day rule. In amending the Federal Rules, the Supreme Court ordered that the new Rule 59 "shall take effect on December 1, 1995, and shall govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending." Order of April 27, 1995, Rules of Civil Procedure, FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 38 (1997). The Alvarezes' case was such a pending proceeding when judgment was entered in their case on November 28, 1995, two days prior to the rule [*4] change. We find that the proximity of the rule change to the judgment in this case, the district court's own unawareness of the rule change, and most importantly, the Alvarezes' need for closure in a case in which

they lost a husband and father, make it unjust and impracticable for this court not to address the merits.

B. Rulings at Issue

The Alvarezes appeal eighteen different district court rulings in discovery, in evidentiary rulings, and in jury instructions. While we feel that Joe Alvarezes' death was needless, we cannot find reversible error in any of the court's rulings.

1. Discovery Rulings

We review a district court's rulings concerning discovery for abuse of discretion. Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1469 (9th Cir. 1992) (citing Ah Moo v. A.G. Becker Paribas, 857 F.2d 615, 619 (9th Cir. 1988); see also Stitt v. Williams, 919 F.2d 516, 526 (9th Cir. 1990) (deciding denial of Rule 56(f) discovery motion under abuse of discretion standard). The Alvarezes contest the magistrate judge's discovery ruling disallowing Officer Running's police employment file while he was an officer for the City of Beaumont. The file sets forth, inter [*5] alia, evidence that Officer Running filed an inaccurate police report, was involved in a prior internal affairs investigation, and used "rude verbal language" during an arrest.

First, the Alvarezes claim that the inaccurate police filing was relevant to Officer Running's credibility, and they should have been able to obtain that evidence as such. The magistrate judge found the inaccurate report irrelevant because the Alvarezes' claim that Officer Running had falsified reports in the present case was previously dismissed. While an arguably inaccurate filing might go to a witness' credibility, denying the evidence did not constitute an abuse of discretion.

Second, the Alvarezes claim that Officer Running's involvement in an internal affairs investigation and use of "rude verbal language" during an arrest goes to the City's poor hiring

practices and is relevant to the City's Monell liability under Monell v. New York City Dept. of Social Serv., 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Under Monell and its progeny, a city may be held liable if it authorizes the use of constitutionally excessive force. If, however, it is found that no person has suffered a constitutional [*6] injury, as it was in this case, the claim against the city is moot. City of Los Angeles v. Heller, 475 U.S. 796, 799, 106 S. Ct. 1571, 1573, 89 L. Ed. 2d 806 (1986); Forrester v. City of San Diego, 25 F.3d 804, 808, cert. denied, 513 U.S. 1152, 115 S. Ct. 1104, 130 L. Ed. 2d 1070 (1995). Therefore, any discovery ruling that thwarted support of the Alvarezes' Monell claim is moot.

Finally, the Alvarezes claim that Officer Running's use of "rude verbal language" is relevant to his use of excessive force because he could not talk the Alvarezes out of their dispute. It does not necessarily follow that being polite prevents fights in explosive situations. The magistrate judge correctly found that using rude language was irrelevant to the alleged use of excessive force. Therefore, we find it was not an abuse of discretion for the district court not to allow discovery of Officer Running's prior employment file.

2. Evidentiary Rulings

A trial court has broad discretion to admit or exclude evidence, and we review such decisions only for an abuse of that discretion. In re Aircrash in Bali, 871 F.2d 812, 816 (9th Cir. 1989) (citation omitted). Reversal is appropriate only if the error [*7] affected the substantial rights of the parties. Id. The Alvarezes contend that the following evidence was improperly admitted during trial: (1) Officer Running's understanding that he would be prosecuted if he failed to make a private person arrest for anyone, including Fina; (2) the fight between Fina and Christina, including the fact that Frank said "let them fight," and that Frank was immature; and (3) the fact that Deputy

Moreno drove to the Alvarezes' house because he recognized their address over the police radio.

The Alvarezes argue that Officer Running's understanding that he should make an arrest for Fina was irrelevant and should have been excluded under Graham v. Connor, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). Here, while Officer Running's understanding of private person arrests may shed some light on the tenseness and uncertainty of the situation, it probably should have been excluded under Graham. We cannot find, however, that excluding that information would have affected the jury's deliberations.

The Alvarezes contend that evidence of the fight and Deputy Moreno's knowledge of the Alvarezes defamed them and misled the jury into believing [*8] the Alvarez family was dysfunctional. The district court ruled that the probative value of the evidence outweighed the prejudicial effect because it provided background, "set the stage" for Officer Running's arrival, and because the jury would want to know what had occurred. During trial, this evidence in fact came out as a precursor to the officers' arrival on the scene. Therefore, we conclude that it was not an abuse of the court's discretion to admit the information.

The Alvarezes further contend that the following evidence was improperly excluded during trial: (1) Fina's character; (2) Officer Running's knowledge of Fina; (3) Officer Running's alleged post-shooting review of the police manual; and (4) Deputy Moreno's testimony that he advised Officer Running to get medical assistance. At trial, the Alvarezes tried to show that Officer Running knew Fina, that she was not a credible person, that her character for truthfulness was bad, and that she had a tendency to lie. Fina's reputation to Officer Running was apparently based on her false claim that she was going out with some of Westmorland's police officers. On cross-examination

of Officer Running, the Alvarezes tried to establish [*9] that Officer Running had "prior knowledge . . . that [Fina] had a tendency to lie." The district court properly denied the offer because it was hearsay.

The Alvarezes also wanted to show that Officer Running lied about not recognizing Fina in a statement given the night of the shooting and later in his deposition. The court sustained a relevance objection to the following question: "In fact, the reason that you denied knowing who [Fina] was immediately upon arriving at the scene was because you did not want to be portrayed as insisting on speaking to someone that you knew had a tendency to lie when the real victim, Christina Alvarez, was outside the residence, isn't that correct?" The court properly ruled this question as irrelevant. The Alvarezes had already impeached Officer Running about inconsistencies in his testimony regarding when he recognized Fina, which the court did allow.

The Alvarezes' theory about the shooting was that Officer Running lied, then attempted to conform his testimony to the physical evidence and to his alleged later-acquired understanding of what he had to have done to justify the shooting. The Alvarezes attempted to admit evidence showing that Officer [*10] Running had taken the police manual home the day of the shooting. The district court ruled such evidence irrelevant. The Alvarezes concede this matter to be "a relatively small point in this case." Even if we found such evidence relevant, which we do not, disallowing it cannot be said to have affected the substantial rights of the parties.

At trial, to show that Officer Running was not concerned about Joe's medical condition, the Alvarezes introduced evidence that Officer Running never told anyone he shot Joe. Officer Running claimed he did. To impeach Officer Running, the Alvarezes tried to introduce testimony by a deputy who

allegedly told Officer Running to put out a broadcast notifying others that the suspect had a gunshot wound but that Officer Running did not respond by saying he had already done so. The fact that Officer Running did not respond by saying "I already did," however, does not show that he did not already do it, that he was not concerned about Joe's medical condition, or that he "had panicked and was out-of-control," as the Alvarezes allege. The district court properly disallowed the evidence on hearsay and relevance grounds. We conclude that none of the evidentiary [*11] rulings merit reversal.

3. Jury Instructions

We review jury instructions to determine whether, "taken as a whole, they mislead the jury or state the law incorrectly to the prejudice of the objecting party." City of Long Beach v. Standard Oil of California, 46 F.3d 929, 933 (9th Cir. 1995) (quoting Reed v. Hoy, 909 F.2d 324, 326 (9th Cir. 1989)). In deciding whether the jury was misled, the guidance to the jury provided by the verdict form is considered. In re Aircrash, 871 F.2d at 814. The formulation of the instruction is then reviewed for an abuse of discretion. Reed, 909 F.2d at 326. If the instructions are challenged as a misstatement of the law they are reviewed de novo. Standard Oil, 46 F.3d at 933 (citing Caballero v. City of Concord, 956 F.2d 204, 206 (9th Cir. 1992)). An error in instructing the jury in a civil case requires reversal unless the error is more probably than not harmless. Caballero, 956 F.2d at 206 (citing Coursen v. A.H. Robins Co., Inc., 764 F.2d 1329, 1337 (9th Cir. 1985)).

In the present case, we find that the jury instructions considered together did not prejudice the Alvarezes by misleading the jury or misstating the [*12] law. The Alvarezes contend that the jury should have been instructed under the "objective reasonableness" standard under Graham v. Conner, for all of their claims against Officer Running and the City. 490

U.S. at 396-97; 109 S. Ct. at 1872. In fact, the district court did apply the Graham standard to the Alvarezes claims of excessive force and so instructed the jury of the "objective reasonableness" standard:

You are instructed that every person has the right not to be subjected to unreasonable or excessive force. Whether or not the force used was unnecessary, unreasonable, or violent, is an issue to be determined by you in the light of all the surrounding circumstances on the basis of that degree of force a reasonable and prudent officer would have applied under the circumstances confronting the officer at the time. The fact that an officer used physical force in conformity with his training is not evidence that the use of physical force is objectively reasonable. The test is whether the officer's conduct was objectively reasonable as defined in these instructions, and not whether the officer acted in conformity with his training.

(emphasis [*13] added).

The special verdict form for Dolores and Frank Alvarez' Fourteenth Amendment claim read: "Did Plaintiffs Frank Alvarez and Dolores Alvarez prove by a preponderance of the evidence that Defendant Officer Lloyd Running used excessive force by shooting Joe Alvarez?" The jury checked "No." Thus, the jury did not even reach the second question which read: "Did Plaintiffs Frank Alvarez and Dolores Alvarez prove by a preponderance of the evidence that Defendant Officer Lloyd Running acted recklessly or with deliberate indifference to their rights of familial relationship and society by using excessive force against Joe Alvarez?" We find that the verdict form questions were adequately differentiated and the jury's finding sufficient.

The district court applied the Graham standard to excessive

force used against Joe under the Fourth Amendment, but not to the Alvarezes' rights to recover for loss of familial relationship and society under the Fourteenth Amendment. The Alvarezes claim it was error for the district court to find that Graham did not apply to survivor claims under § 1983 and that something more than "objective reasonableness" was necessary to succeed on a "third-person" [*14] Fourteenth Amendment claim for loss of familial relationship and society, rather than a "first-person" Fourth Amendment claim for use of excessive force. n1 This contention, however, is moot. Since the jury found that Officer Running did not use excessive force under the objective reasonableness standard even against Joe, the Alvarezes' derivative claims cannot survive. Accordingly, even if the district court may have erred by using a substantive due process standard in its instructions elsewhere, the error was not prejudicial.

----------Footnotes----------

n1 The Alvarezes contend that the judge essentially confused the law by creating a standard dependent upon whether a survivor creates an estate for the deceased. This contention has no place in this argument. The distinction turns on whether one is asserting one's own rights or someone else's, not whether an estate is involved.

----------End Footnotes----------

The Alvarezes next contend the district court erred in denying the following proposed instructions with regard to the Alvarezes' attempt to show that it was unreasonable [*15] for Officer Running to have shot Joe: (1) "in determining the reasonableness of the officer's use of force, you may consider whether or not alternative courses of action were available to the officer," (2) "the police should give a warning before force is used against a person, if feasible," and (3) the standards for using deadly force under both federal and California law.

The reasonableness standard of Graham includes the Alvarezes' objections under state law.

The test of "reasonableness" is not capable of precise definition or mechanical application (citation omitted), however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Graham, 490 U.S. at 396; 109 S. Ct. at 1872. Therefore, it was not an abuse of discretion for the court to deny the suggested instructions of the plaintiffs, particularly in light of the objective reasonableness instruction that had already been given. Moreover, [*16] the Alvarezes fail to explain how they were prejudiced by the court's omission of specifications of a standard that, according to the Supreme Court, eludes specification.

The Alvarezes contend that the burden of proving self-defense should have been placed on Officer Running because Officer Running cited it as his nineteenth affirmative defense. The proper inquiry, however, is not whether Officer Running acted in self-defense, but whether he acted reasonably.

Quintanilla v. City of Downey, 84 F.3d 353 (9th Cir. 1996), cert. denied, 117 S. Ct. 972, 136 L. Ed. 2d 856 (1997). In Quintanilla, the court disposed of the issue in a footnote: "Plaintiff also argues that the district court erroneously refused to instruct the jury with regards to self-defense. We summarily dispose of this contention because it has no basis in the law, and is therefore without merit." 84 F.3d 353 n.1. We follow the court's decision in Quintanilla.

The Alvarezes also claim that Officer Running had no right to enter the Alvarezes' household and so the trial court should have allowed instructions that would: (1) place the burden of

proving the lawfulness of entry on Officer Running; and (2) inform [*17] the jury that there were no exigent circumstances justifying entry. It is true that the burden of justifying a search generally falls on the government. United States v. Carbajal, 956 F.2d 924, 930 (9th Cir. 1992). In determining whether exigent circumstances justify an exception to the general rule requiring a search warrant, the burden rests on the government to show that the warrantless entry was "imperative." United States v. Tarazon, 989 F.2d 1045, 1049 (9th Cir.), cert. denied, 510 U.S. 853, 114 S. Ct. 155, 126 L. Ed. 2d 116 (1993). Here, however, the Alvarezes are contending that the issue should not even have gone to the jury. We disagree. Evidence was presented at trial on both sides of the issue, i.e., Fina was not bleeding when Officer Running saw her go into the house, but Fina was also inside the house calling for Officer Running. Therefore, it was not error for the district judge to let the jury decide while placing the burden on Officer Running.

Next, the Alvarezes contend that the district judge improperly denied the Alvarezes' request for jury instructions containing a definition of domestic violence under California Penal Code § 13700 and explaining [*18] that the fight between Christina and Fina was not domestic violence. Nothing in the trial implied that the Alvarezes committed a crime under California law or any other law. Despite the Alvarezes' claim that this omission was extremely prejudicial because it came "on the heels of the most publicized alleged domestic violence case ever - the Brentwood murders of Nicole Brown Simpson and Ronald Goldman - the refusal to instruct had to have been detrimental to plaintiffs' cause," there is nothing to show that the jury was affected by the Simpson case. We find no error in the district court's denial of this instruction. This is a case about the possible violation of the Alvarezes' constitutional rights by the state, not the Alvarezes' infringement of any state law. Such

an instruction might have been misleading and confusing to the jury.

The district court also denied instructions that under California law, "any necessary force may be used to protect from wrongful injury the person or property of oneself, or of a wife, husband, child, parent, or other relative, or member of one's family," and that a "homeowner may use reasonable force to evict the police officer who entered the home in [*19] violation of law." Contrary to the Alvarezes' contention, self-help in resisting arrest under all circumstances is not endorsed under California law. See Evans v. Bakersfield, 22 Cal. App. 4th 321, 326, 27 Cal. Rptr. 2d 406, 408-09 (1994) (striking "Coffey instruction" which stated "every person is permitted to use reasonable force to resist an unlawful detention or unlawful search. . ."). Here, the district court in fact instructed the jury that a person may use reasonable force in self defense against the excessive force of a police officer. We find that instruction to be adequate.

The Alvarezes next appeal the court's refusal to instruct the jury on their state law wrongful death cause of action because the Alvarezes failed to specify that claim during the pretrial conference. The Alvarezes contend that the following issue in their pretrial statement covered the wrongful death cause of action: "Did any defendant violate any of the plaintiffs' alleged state law rights?" Permitting a general catch-all phrase to preserve all conceivable state law claims would frustrate the purpose of the pretrial statement because defendants would have no reasonable notice of the claim. [*20] See McGonigle v. Combs, 968 F.2d 810, 818-19 (9th Cir.) (upholding trial court's decision to disallow plaintiffs from admitting evidence on claim not specified in their pretrial list two weeks into trial), cert. dismissed sub nom., 506 U.S. 948, 113 S. Ct. 399, 121 L.

Ed. 2d 325 (1992).

Finally, the Alvarezes claim that the district court's denial of the Alvarezes' motion to amend the pretrial order was a miscarriage of justice. District courts may amend pretrial orders only if: (1) no substantial injury will be occasioned to the opposing party, (2) refusal to allow the amendment might result in injustice to the movant, and (3) the inconvenience to the court is slight. Amarel v. Connell, 102 F.3d 1494, 1515 (9th Cir. 1996) (citing Campbell Industries v. M/V Gemini, 619 F.2d 24, 27-28 (9th Cir. 1980)). Here, in the end stages of the trial, during the hearing on jury instructions, the Alvarezes managed to surprise not only Officer Running, but the district judge as well. After hearing both sides, the court was persuaded that Officer Running would have put on a different case had he known about the claim from the beginning, and therefore rejected the offered instruction [*21] on wrongful death. The case might be different if the Alvarezes had specifically preserved their wrongful death claim. Clearly, the district judge properly prevented the Alvarezes from raising this claim at the end of trial. Therefore, we find no error in this decision.

CONCLUSION

This court finds that the Alvarezes received a full and fair trial. The jury squarely decided that Officer Running did not use excessive force. We have jurisdiction and we affirm.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOLORES ALVAREZ, FRANK ALVAREZ, CRISTINA ALVAREZ,

Plaintiffs-Appellants,

v.

FILED
SEP - 3 1997
CATHY CATTERSON CLERK
U.S. COURT OF APPEALS

CITY OF WESTMORLAND and LLOYD RUNNING, in both his person and official capacities, and DOES 1 through 200, inclusive,

Defendants-Appellees.

No. 96-55431
D.C. No. CV 94-01119 IEG
ORDER

Before: CANBY and THOMAS, Circuit Judges, and KING,[1] District Judge.

The panel has voted to deny appellants' petition for rehearing. Judge Thomas has voted to reject the suggestion for rehearing en banc. Judge Canby and Judge King have recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the

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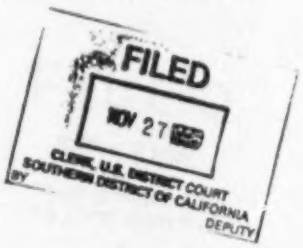
[1] Honorable Samuel P. King, Senior Untied States District Judge for the District of Hawaii sitting by designation.

suggestion for rehearing en banc is REJECTED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DOLORES ALVAREZ, FRANK ALVAREZ, CHRISTINA ALVAREZ,

Plaintiff(s),



vs.

CITY OF WESTMORLAND, FRED BELTRAN, LLOYD RUNNING, in both their personal and official capacities, and DOES 1 through 200, inclusive,

Defendants.

Case No. 94 1119 IEG (CM)

JUDGMENT ON SPECIAL VERDICTS

This action came on regularly for trial on October 17, 1995, in Courtroom 11 of the above entitled Court, the Honorable Irma E. Gonzalez, Judge, presiding, the Plaintiffs Dolores Alvarez, Frank Alvarez, and Christina Alvarez, appearing by attorney Robert Mann and Jorge Gonzalez and the Defendants City of Westmorland and Lloyd Running appearing by attorney Peter J. Ferguson of Ferguson, Praet & Sherman.

A jury of eight persons was impaneled and sworn. Witnesses were sworn and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return verdicts on special issues. The jury deliberated and thereafter returned into the court with its verdicts consisting of the special issues submitted to the jury and the answers given thereto by the jury, which said verdicts were filed with the clerk and entered upon the minutes and

was in words and figures as follows to wit:

We, the jury, in the above-entitled action, find the following Special Verdict On Dolores and Frank Alvarez' Fourteenth Amendment Claim submitted to us:

QUESTION NO. 1: Did Plaintiffs Frank Alvarez and Dolores Alvarez prove by a preponderence of the evidence that Defendant Officer Lloyd Running used excessive force by shooting Jose Alvarez?

Answer "yes" or "no."

Answer: No

If you answer "yes" to Question No. 1, then answer Question No. 2. If you answer "no" to Question No. 1, sign and return this verdict.

DATED: November 1, 1995 Gerald Meyer
PRESIDING JUROR

We, the jury, in the above-entitled action, find the following Special Verdict On Frank Alvarez' Excessive Force Claim submitted to us:

QUESTION NO. 1: Did Plaintiff Frank Alvarez prove by a preponderance of the evidence that Defendant Officer Lloyd Running used excessive force upon Frank Alvarez?

Answer "yes" or "no."

Answer: No

If you answer "yes" to Question No. 1, then answer Question No. 2. If you answer "no" to Question No. 1, sign and return this verdict.

DATED: November 1, 1995 Gerald Meyer
PRESIDING JUROR

We, the jury, in the above-entitled action, find the following Special Verdict On Christina Alvarez' Excessive Force Claim submitted to us:

QUESTION NO. 1: Did Plaintiff Christina Alvarez prove by a preponderance of the evidence that Defendant Officer Lloyd Running used excessive force upon Christina Alvarez?

Answer "yes" or "no."

Answer: No

If you answer "yes" to Question No. 1, then answer Question No. 2. If you answer "no" to Question No. 1, sign and return this verdict.

DATED: November 1, 1995 Gerald Meyer
PRESIDING JUROR

We, the jury, in the above-entitled action, find the following Special Verdict On Frank Alvarez' Emotional Distress Claim submitted to us:

QUESTION NO. 1: With regard to Plaintiff Frank Alvarez' claim of wrongful infliction of emotional distress of a bystander, did Plaintiff Frank Alvarez prove by a preponderance of the evidence that Defendant Officer Lloyd Running acted as an unreasonable police officer when he shot Joe Alvarez?

Answer "yes" or "no."

Answer: No

If you answer "yes" to Question No. 1, then answer Question No. 2. If you answer "no" to Question No. 1, sign and return this verdict.

DATED: November 1, 1995 Gerald Meyer
PRESIDING JUROR

We, the jury, in the above-entitled action, find the following Special Verdict On Christina Alvarez' Emotional Distress Claim submitted to us:

QUESTION NO. 1: With regard to Plaintiff Christina Alvarez' claim of wrongful infliction of emotional distress of a bystander, did Plaintiff Christina Alvarez prove by a preponderance of the evidence that Defendant Officer Lloyd Running acted as an

unreasonable police officer when he shot Joe Alvarez?

Answer "yes" or "no."

Answer: No

If you answer "yes" to Question No. 1, then answer Question No. 2. If you answer "no" to Question No. 1, sign and return this verdict.

DATED: November 1, 1995 Gerald Meyer
PRESIDING JUROR

We, the jury, in the above-entitled action, find the following Special Verdict On Frank Alvarez' Claim of Battery submitted to us:

QUESTION NO. 1: With regard to Plaintiff Frank Alvarez' claim of battery, did Defendant Officer Lloyd Running use unreasonable or excessive force on Frank Alvarez?

Answer "yes" or "no."

Answer: No

If you answer "yes" to Question No. 1, then answer Question No. 2. If you answer "no" to Question No. 1, sign and return this verdict.

DATED: November 1, 1995 Gerald Meyer
PRESIDING JUROR

We, the jury, in the above-entitled action, find the following Special Verdict On Christina Alvarez' Claim of Battery submitted to us:

QUESTION NO. 1: With regard to Plaintiff Christina Alvarez' claim of battery did Defendant Officer Lloyd Running use unreasonable or excessive force on Christina Alvarez?

Answer "yes" or "no."

Answer: No

If you answer "yes" to Question No. 1, then answer Question No. 2. If you answer "no" to Question No. 1, sign and return this verdict.

DATED: November 1, 1995 Gerald Meyer
PRESIDING JUROR

We, the jury, in the above-entitled action, find the following Special Verdict On Dolores Alvarez' Claim of Unlawful Entry submitted to us:

QUESTION NO. 1: Did Plaintiff Dolores Alvarez prove by a preponderance of evidence that Defendant Lloyd Running unlawfully entered her home?

Answer "yes" or "no."

Answer: No

If you answer "yes" to Question No. 1, then answer Question No. 2. If you answer "no" to Question No. 1, sign and return this verdict.

DATED: November 1, 1995 Gerald Meyer

PRESIDING JUROR

It appearing that by reason of these special verdicts:

Than Defendants City of Westmorland and Lloyd Running are entitled to judgment that Plaintiffs Dolores Alvarez, Frank Alvarez and Christina Alvarez take nothing.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT:

That Defendants City of Westmorland and Lloyd Running have judgment that Plaintiffs Dolores Alvarez, Frank Alvarez and Christina Alvarez take nothing.

AND, that Defendants recover costs and disbursements taxed in the sum of $_____.

Dated: 11/13/95 /S/

IRMA E. GONZALEZ
UNITED STATES DISTRICT JUDGE